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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DEVELOPERS SURETY AND INDEMNITY COMPANY,

Cross-complainant and Respondent,

v.

WILLIAM ALVIN LEE,

Cross-defendant and Appellant.

E044196

(Super.Ct.No. RCV079568)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. Michael Gunn, Judge. Affirmed with directions.

Millard, Holweger, Child & Marton and Marie Polizzi Holweger for Cross-defendant and Appellant.

Hausman & Sosa, Carlos E. Sosa and Larry D. Stratton for Cross-complainant and Respondent.

Cross-defendant and appellant William Alvin Lee (Lee) appeals a default judgment against him in favor of cross-complainant and respondent Developers Surety and Indemnity Company (Developers Surety), on a cross-complaint for indemnity in an underlying construction dispute. We shall modify the judgment to strike an improper element of damage, and otherwise affirm.

FACTS AND PROCEDURAL HISTORY

Lee operated a construction business under the name Great American Building Company (Great American). In 2003, according to a complaint filed by plaintiffs Ned and Terry Hennigan (homeowners), the homeowners had contracted with several parties and entities, including Great American and Lee, to remodel the bathroom in their home. An entity known as American Timber Structures, Inc. (American Timber), and its owner, Jonathan Wolf (Wolf), represented that they were authorized to do construction under Great American's contractor's license. Developers Surety had issued a contractor's license bond in favor of Great American and Lee, guaranteeing their performance on the homeowners' project.

Evidently, the project did not proceed well, and the homeowners sued Wolf, American Timber, Lee, and Great American for breach of contract, rescission, restitution, fraud, negligent misrepresentation, negligence, conspiracy, unjust enrichment, constructive trust, and unfair business practices. The homeowners included a cause of action against Developers Surety on the bond, and named all defendants in a cause of action for declaratory relief.

The homeowners served their summons and complaint on Lee and Great American in May 2004. Also in May 2004, Developers Surety filed its cross-complaint for indemnity and reimbursement against Lee and Great American. Developers Surety alleged that it was an Iowa corporation licensed to do business in California, and that Lee and Great American had made a written application in 1996 for a contractor's license bond. The homeowners' action sought payment of the contractor's license bond for alleged misfeasance of Lee and Great American. Developers Surety therefore sought indemnity from Lee and Great American pursuant to the relevant provisions of the bond agreement. Developers Surety alleged that, in exchange for the surety agreement, Lee and Great American "agreed to indemnify [Developers Surety] against any claims, demands, costs or liabilities, including counsel fees, as a consequence of its executing any bond . . . ." Developers Surety had demanded of Lee and Great American that they "protect and defend the rights of [Developers Surety], and . . . reimburse [Developers Surety] for costs expended as a result of claims against the bond." In addition to the cause of action for indemnity, Developers Surety included a cause of action for reimbursement pursuant to Civil Code section 2847: "If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses."

Developers Surety thus prayed for "the amount of any judgment rendered in favor of [the homeowners] against [Developers Surety] in the main action," for "its costs and expenses and attorney's fees incident to its investigation and defense herein and in the

prosecution of this cross-action," for "the amount of any payment made from the penal sum of said bond," as well as for interest and other relief. The summons and cross-complaint were served on Lee and Great American in June 2004.

Lee and Great American elected not to appear in the actions. Their default was filed in July 2004 on the cross-complaint and in September 2004 on the complaint. The default on the cross-complaint stated that the "demand of complaint" was "to be proved at time of trial," and stated no specific dollar amounts.

Between 2004 and 2007, Developers Surety continued to litigate the main action. In early 2007, Developers Surety presented its request for entry of a default judgment against Lee and Great American. The request recited that judgment was to be entered on the "demand of complaint," for $6,000, costs of $351, and attorney fees of $8,839.87, for a total of $15,190.87. Accompanying declarations and points and authorities indicated that Developers Surety had ultimately paid $6,000 to the homeowners on the bond, which amount Developers Surety was now seeking from Lee and Great American on the indemnity clause. Developers Surety's papers also included an application for attorney fees; it had been obliged to hire counsel and to file a protective cross-complaint. Through January 2007, Developers Surety had incurred attorney fees of $9,191.07. Developers Surety contended that the attorney fees provision of the bond was not a standard prevailing party clause, but a specific agreement to indemnify Developers Surety from any loss, including attorney fees, incurred on the bond agreement. Thus, Developers Surety claimed the attorney fees as an item of damages.

The trial court granted a default judgment on the cross-complaint on March 27, 2007, for the full amount requested.

In August 2007, Lee and Great American filed a motion to vacate the default judgment. Lee and Great American asserted that the default judgment was in excess of jurisdiction and violative of cross-defendants' due process rights, because the amounts claimed and awarded were in excess of the damages alleged in the cross-complaint, cross-complainant Developers Surety lacked standing to sue, and Developers Surety had not proven any liability against Lee or Great American. Lee and Great American also contended that extrinsic fraud had prevented them from appearing to defend.

The homeowners had not responded to Lee's request for a copy of the construction contract, but Lee believed that nothing on the face of the contract would show that he or Great American had anything to do with the homeowners' construction project. In addition, Developers Surety itself had never apparently been given a copy of the construction contract on which Lee's and Great American's (and Developers Surety's) liability supposedly depended.

Lee and Great American asserted also that their bond and indemnity agreement had been made with a different entity, Developers Insurance Company, a California corporation, not Developers Surety, an Iowa corporation. Developers Surety was not licensed to do business in California until 1999, three years after the date of the bond agreement Lee and Great American had entered into.

With their motion to vacate the default judgment, Lee and Great American also appended a proposed answer to the cross-complaint.

Lee himself filed a declaration in support of the motion to vacate the default judgment. He averred that he had a California contractor's license until 2006. When he undertook construction projects, he used the business name of Great American. In 2006, he moved to Washington and let his contractor's license lapse. Lee did not enter into any construction agreement with the homeowners, and he never gave Wolf or American Timber permission to use his contractor's license number. Lee knew nothing about the homeowners' project until early 2004, when a subcontractor on the job called to complain about not being paid. At that time, Lee contacted the homeowners and informed them that he and Great American had nothing to do with the project. He also telephoned Wolf and urged him to address the homeowners' concerns. Wolf promised to "take care of it."

After Developers Surety filed its cross-complaint, Lee again spoke to Wolf. Wolf promised to "take care of the case, at no expense to [Lee], and that [Lee's] State Contractor's license would not be affected." Lee "had a similar telephone conversation with Wolf's lawyer . . . . I believed that they would be representing me in the case and handling all expenses."

Lee informed Developers Surety that he had had nothing to do with the homeowners' construction project. Lee averred that he never received any request to enter default judgment on the cross-complaint.

Developers Surety opposed the motion to vacate. It asserted that it was the proper party, as Developers Insurance Company and Developers Surety had merged in 2000. Lee had renewed his bond with Developers Surety after the merger. The cross-complaint on its face stated the total penal sum of the bond ($7,500), but the exact amount that might have to be paid out was not determinable until the conclusion of the main action. Additionally, attorney fees and costs incurred in the litigation could not be fixed until the litigation was concluded. Lee and Great American were "on notice of all potential losses." Lee evidently knew of the cross-complaint, and had actually communicated with the homeowners, Wolf, and counsel for Developers Surety. Developers Surety argued that Lee had not demonstrated any extrinsic fraud, which prevented his participation in the suit and countersuit. Instead, he elected to do nothing, despite his knowledge of the claims.

Lee and Great American responded, reiterating their claims that the default judgment was void for exceeding the amount pled in the cross-complaint, that the prove-up was inconsistent with the cross-complaint, requiring renewed service and an opportunity to respond, and that the pleadings failed to state a cause of action against Lee or Great American.

After argument on the motion, the court denied Lee's and Great American's motion to vacate the default judgment.

Lee and Great American filed a timely notice of appeal.

ANALYSIS

I. Standard of Review

On review of a motion to vacate a default judgment, the appellate court will not disturb the factual findings of the trial court if they are supported by substantial evidence. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828.) "[W]hether the default and default judgment complied with constitutional and statutory requirements," however, "are questions of law as to which we exercise independent review." (*Ibid*.)

Here, the crux of the matter is whether the default and default judgment satisfied the statutory and constitutional requirements.

II. The Default Judgment As to the Bond Amount Was Proper

A trial court may not grant a default judgment in an amount greater than that demanded in the complaint. (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494; *Falahati v. Kondo*, *supra*, 127 Cal.App.4th 823, 830.) "The notice requirements of due process lie at the core of [Code of Civil Procedure] section 580," and thus "must be strictly construed." (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 535.)

Developers Surety's cross-complaint alleged that the face amount of the bond was $7,500, but the prayer was not specific. It made only a general request for "the amount of any payment made from the penal sum of said bond."

Lee argues that Developers Surety essentially admitted that its prayer was not specific, as its request for default judgment stated that the "demand of the complaint" was "to be proved at time of trial."

"It was formerly held that a defendant who intended to default did not need to examine the allegations of the complaint to determine what relief might be granted, but was entitled to rely on the specific demands of the prayer. [Citations.]" (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 149, p. 584.) However, "[i]t is now established that the allegations of the complaint may cure a defective prayer for damages." (*Id*. at p. 585, citing *Becker v. S.P.V. Construction Co., supra*, 27 Cal.3d 489, 494.)

Here, even though the prayer was not specific in identifying the amount demanded on the bond, the body of the complaint identified the bond as having a face value of $7,500. That was therefore the maximum indemnity exposure Lee and Great American faced on the bonded liability. Developers Surety settled the matter for $6,000, within the face amount of the bond. Lee and Great American were on notice of their potential liability to indemnify for that amount. The trial court therefore properly denied the motion to vacate the default judgment as to the damages element of the bond payout.

III. The Default Judgment As to Costs Was Proper

The application for a default judgment permits recovery of costs. A memorandum of costs must be submitted at the time of application. (Cal. Rules of Court, rule 3.1700(a)(2).) Here, the claimed costs consisted of filing fees for the cross-complaint and process serving fees, a total of $351. Such costs are allowed by statute to be recovered in a default judgment. (Code Civ. Proc., § 585.) Lee and Great American were thus on statutory notice of the costs to be incurred in taking a judgment by default. Naturally, the

exposure for costs in a default action is expected to be relatively minor. (Cf. *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 859 [trial court did not abuse its discretion in denying costs where most of the costs were incurred after refusing to set aside the default].) The refusal to vacate the default judgment as to the costs awarded was proper.

IV. The Award of Attorney Fees As an Element of Damages Was Void

Code of Civil Procedure section 585 also permits an award in a default judgment of attorney fees. Such attorney fees, however, are limited to those necessarily incurred in prosecuting the default action. Here, however, the bulk of the $8,839.87 claimed for attorney fees related not to the prosecution of the defaulted cross-complaint, but to Developers Surety's litigation of the homeowners' main action. Developers Surety made clear that its request for attorney fees was not as an item of "costs and [] attorney fees" relating to the default action, but as an item of damages for which Lee and Great American owed indemnity under the bond agreement.

As a separate item of damages, the attorney fees claim was required to be separately demanded in the cross-complaint. In fact, the cross-complaint did demand indemnity for any attorney fees incurred in defending the claim on the bond, but no amount was stated on the face of the complaint or in the prayer. As was made clear in *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, a defendant must be served, in some manner, either by pleading or by a separate statement of damages, with notice of the amount of money damages or other relief sought. "The statutes apply with equal force to cross-complaints and cross-defendants." (*Id.* at p. 1320.) The statutes

"preserve the defendant's right to contest an action and protect the defendant from unlimited liability." (*Ibid*.)

Developers Surety complained below that it could not have known, before actually conducting the underlying litigation and settling the case, the amount of the attorney fees it would incur, and so could not include a specific amount in the prayer of the cross-complaint. Rather than supplying a justification for imposing liability for attorney fees upon Lee and Great American, this argument effectively admits that no specific amount was demanded. Thus, no notice was provided by service of the cross-complaint. The remedy, of course, was to amend the pleading once this item of damage had become known, and to re-serve the amended pleading on Lee and Great American, thus affording them a new opportunity to decide whether to forgo answering to the new amount demanded. (See, e.g., *Greenup v. Rodman* (1986) 42 Cal.3d 822, 830.)

The requirements of Code of Civil Procedure section 585 have been read strictly to mean that a default judgment beyond the amount specifically demanded is void as beyond the court's jurisdiction. (See, e.g., *Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1136.) There was no specifically demanded amount in the cross-complaint for attorney fees as an element of damages. To that extent, the default judgment was void. Accordingly, we shall order that portion of the default judgment stricken.

DISPOSITION

The default judgment was proper as to the $6,000 on the bond and as to the $351 claim for costs. The default judgment was void as to the amount claimed for attorney

fees. We order the judgment modified to strike the void award for attorney fees, and affirm the judgment as so modified.

Each party shall bear their own costs.

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/s/ McKinster
Acting P.J.

We concur:

/s/ Gaut
J.

/s/ King
J.